Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

COMMENT.

CONSTITUTIONAL RIGHT TO INDICTMENT AND UNANIMOUS VERDICT IN HAWAII.

The imperative necessity of a final settlement of the question whether the Constitution extends to our island possessions is shown by the latest decisions from Hawaii, their Supreme Court giving two conflicting opinions on the same day, owing to the change of a single judge. *Ex-parte Edwards* and *Territory of Hawaii* v. *Marshall.* And the United States district judge has refused to release on *habeas corpus* the prisoners in the latter case.

On July 7, 1898, by a joint resolution of Congress, the Republic of Hawaii was annexed to the United States. In terms it was, "Resolved, that * * * the said Hawaiian islands be and hereby are annexed as a *part* of the United States. * * * * The municipal legislation of the Hawaiian islands not inconsistent with this resolution, *nor contrary to the Constitution of the United States*, shall remain in force until the Congress of the United States shall otherwise determine." 30 *U. S. Stat. at Large*, p. 750. The ceremony of transfer took place August 12, 1898. Not until June 14, 1900, however, was Hawaii organized into a territory.

Intermediate the act of transfer and the taking effect of the enabling act, one Edwards was tried for an attempt to commit sodomy, upon an indictment found by a judge, and convicted by a verdict of ten out of twelve jurors, and sentenced to five years' imprisonment—all of which were regular under the old Hawaiian law, but which were questioned upon *habeas corpus* as being in violation of the United States Constitution, requiring prosecutions for infamous crimes to be upon an indictment by a grand jury first, and then conviction by an unanimous verdict. The majority opinion by Galbraith, J., is very full, and concludes that the Constitution did apply and grants the prisoner's discharge. It follows the line of argument advanced by Tochren, J., in *Ex-parte Ortez*, 100 Fed. 961, holding that the Constitution and

the legislative power are co-extensive; that with the Constitution go its guarantees, especially its provisions requiring an indictment and unanimous verdict; and that, therefore, the negative provisions of the Constitution designed to protect life and property were in force after the transfer and before the organic act went into effect. In a vigorous dissenting opinion, Frear, C. J., maintains with ability that while admitting the Constitution extended to Hawaii, this does not necessitate the admission that its fifth and sixth amendments were in force there, since such is not a sound construction of the joint resolution and are matters of procedure rather than fundamental rights.

The second case, *Territory of Hawaii* v. *Marshall*, upheld a verdict found by nine out of twelve jurors, convicting Marshall of criminal libel, upon which he was sentenced to six months at hard labor in the Oahu prison. Judge Estee of the United States District Court declined to release him on *habeas corpus*, because the case was not extreme enough to take the Constitutional question from the Federal Supreme Court on writ of error to the territorial court, but he remarked *obiter* that the Constitution did not apply—held rather strangely, we think, that the nature of the crime and not its punishment, made it infamous, or not.

It is submitted that the question involved is simpler and more specific than the one in *Goetz Bros.* v. *United States*, decided by United States District Judge Townsend against the extension of the Constitution to Porto Rico. By the joint resolution it is expressly stipulated that the municipal law of Hawaii not contrary to the Constitution of the United States shall remain in force until changed by Congress. The only question then is, does a prosecution for an infamous crime, without any indictment by a grand jury and without an unanimous verdict, contravene the Constitution of the United States? If it does, then it is clearly rendered void by the joint resolution. So it has been uniformly held; as in *Ex-parte Wilson*, Gray, J., says, "But the Constitution protecting every one from being prosecuted without the intervention of a grand jury, for any crime that is subject by law to an infamous punishment, no declaration of Congress is needed to secure, or competent to defeat, the Constitutional safeguard." 110 U. S., 422.

In *Thompson* v. *Utah*, 170 U. S., 349, it was decided that the territory of Utah could not change the common law rule; nor could Congress permit it to do so.

To rebut these, Frear, C. J., seeks to distinguish between the status of Hawaii before organization and the status of a territory like Utah after it, and refers to constitutional provisions that apply only to states and not to territories, and others that obtain in peace but do not apply in war. His argument is cogently put, but we are forced to repudiate the doctrine of status which he applies. It has never been countenanced by judicial decision and has sprung up within the last few years. It is true that some provisions of the Constitution were meant for states and not for territories, but all decisions so far have held that the fifth and sixth amendments were limitations upon Congress' power in state and territory alike. It is true too that war changes legal relations and affects constitutional provisions, and undoubtedly the law bends to necessity and recognizes it. But the justification of effects consequent upon a state of war, resting solely on the necessity of the thing, is no logical basis for the doctrine of unorganized states, in Hawaii at least, where no such necessity exists, with legal machinery as complete before the enabling act as after it, with the United States in full control, *de jure* as well as *de facto*.

This doctrine that in one status the constitutional provision applies and in another does not, seems to receive countenance in a cited case, *Talton* v. *Mayes*, 163 U. S. 376 (1895). To quote from Frear, J., "There the Supreme Court held that the constitutional provision relating to grand juries did not apply to the Cherokee nation in the Indian Territory, but that an indictment found by a grand jury of only five persons under the laws of that nation was constitutional." I may incidentally add as bearing upon the other question in this case—the construction of the joint resolution—that it was expressly provided in the treaty under which the Cherokees made their laws that such laws should "not be inconsistent with the Constitution of the United States." But the case itself needs only to be read to dispel the inference that the same conclusions should apply to Hawaii. It holds that the fifth amendment is a limitation upon Congress' power solely, the power of local legislation in the Cherokee nation not coming from Congress, but recognized by treaty, is not limited by the fifth amendment any more than the State of Nebraska is, for as to local government it is similar to the states, not the territories. See *Ballu* v. *Nebraska*, 176 U. S., 83. But can we say so much for Hawaii? Clearly we think not. Once under the complete dominion of the United States, unlike the Cherokees, the nation

ceased, and with it their power of local legislation. After the transfer and by the terms of the resolution, not the laws of Hawaii, but the laws of the United States constituted the law of the land. As far as the old laws were not inconsistent with the Constitution they became for the time being United States laws, deriving their vigor from the Constitution and necessarily controlled by its limitations.

In other words, we believe it is past dispute that Congress cannot pass a law dispensing with a grand jury or substituting a majority verdict for the one required at common law. Further, it cannot permit a territory deriving its power of local legislation from it to pass such a law. Consequently, it seems logical that it cannot, by failing to act, allow such laws to remain in force and thus accomplish indirectly a result which is prohibited by the Constitution.

For Hawaii these questions are set at rest by the enabling act, but their importance and the widespread difference of opinion concerning them, make us look forward eagerly to their final settlement by the Supreme Court, which is promised soon.